No. 80-1009

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM LAWRENCE LENTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish that petitioner conspired to intercept a wire communication transmitted through the facilities of an interstate carrier.
2. Whether petitioner was entrapped as a matter of law.
3. Whether the conduct of local government officials was so outrageous as to bar petitioner's federal prosecution.
4. Whether the trial court correctly instructed the jury on the inference that could be drawn from petitioner's knowing acts.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 624 F.2d 1280.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1980. A petition for rehearing was denied on November 3, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on December 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner and co-defendant R.C. Hullum were convicted on one count of conspiracy to unlawfully intercept a wire communication, in violation of 18 U.S.C. 371 and 2511 (1)(a), and two counts of intercepting and aiding and abetting the interception of a wire communication, in violation of 18 U.S.C. 2511(1)(a) and 2. The government elected to seek imposition of sentence on the conspiracy conviction and only one substantive conviction. Petitioner was sentenced to concurrent terms of one year's imprisonment on each count and was ordered to be released as if on parole after serving six months. The court of appeals affirmed (Pet. App. A).

1. The evidence at trial showed that co-defendant Hullum, a sheriff for Burnet County, Texas, discussed with one of his deputies, Jackie Hall, a plan to wiretap a house thought to be the site for certain narcotics activities (V Tr. 67-68, 79). The house was

occupied by Patricia Maddox and another woman. Deputy Hall balked at the idea, recognizing that a warrantless wiretap would be illegal. Hullum told him to think it over nonetheless (V Tr. 79).

The next day, Hullum told Hall to break into another house believed to contain stolen property in order to obtain information to be used in applying for a search warrant (V Tr. 77, 80-81, 83). Hullum suggested that Hall use petitioner, Deputy Chuck Johnson, and Deputy Bill Fargo to assist him in the break-in (V Tr. 83).[1]

Hall delayed the break-in while he sought advice from Deputy Fargo, a county judge, the local police, and the FBI (V Tr. 85-87; VI Tr. 349-350, 352-353; VII Tr. 519, 539-540, 574). He also obtained a microphone and tape recorder to record future conversations with Hullum (V Tr. 89; VI Tr. 355).

During the next three days, a series of meetings were held to discuss plans for the Maddox wiretap and the break-in. Each meeting was tape-recorded, either by Hall or by Fargo. At the first meeting, held in petitioner's absence, Hullum reiterated his desire to tap the telephone line (VII Tr. 614). He suggested that petitioner be brought in to do the actual tapping and stated that petitioner had already agreed to participate in the break-in (V Tr. 105, 132; VII Tr. 531). The next day, petitioner joined the three men on Hullum's invitation. Hullum asked him to tap the Maddox line. He emphasized that it was a serious undertaking and that they ran the risk of getting into trouble if it was not

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[1] Petitioner had been arrested previously for burglary. He also had worked in the past as a confidential informant for an Austin Police Department task force (V Tr. 185; VII Tr. 574-575, 651-653, 709).

handled correctly. Any misstep, he warned, could result in their serving "federal time" (V Tr. 107, 109-110, 114, 117; VI Tr. 364; VII Tr. 540-541, 581-582, 750). Petitioner, who had tapped a telephone line before, responded enthusiastically, agreed to engage in the wiretap, and explained how he would perform the tasks involved (V Tr. 114, 117; VI Tr. 540, 655). He stated that he knew what they were doing was illegal, and volunteered that if something should happen he alone would take the blame (V Tr. 114; VI Tr. 304, 365; VII Tr. 657).

At a subsequent meeting, petitioner related that he had obtained the equipment needed to tap the line. He and Hullum discussed the location and mechanics of the tap (V Tr. 151; VI Tr. 382). The two men again discussed the illegality of the operation and petitioner again offered to take the blame if they were apprehended (V Tr. 147-149; VI Tr. 381).

The next morning, Hullum, Hall, Fargo and petitioner finalized their plans at the sheriff's office. Those plans, however, soon went awry. After climbing to the top of a telephone pole petitioner attempted vainly for 15 to 20 minutes to find the right line to tap. He and the others then reassembled in the sheriff's office, where petitioner and Hullum later were arrested (V Tr. 153-158; VI Tr. 382, 391-393; VIII Tr. 754-755).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that the evidence adduced at trial was insufficient to sustain his conviction for conspiring and attempting to intercept a wire communication. He bases that contention on the fact that 18 U.S.C. 2510(1) applies only to facilities of common carriers engaged in the "transmission of interstate * * * communications."

Contrary to petitioner's assertion, the evidence, viewed in the light most favorable to the government (*Burks* v. *United States*, 437 U.S. 1, 17 (1978); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), was sufficient to establish that the telephone line that he attempted to tap was capable of transmitting interstate communications. As the court of appeals noted (Pet. App. 11a), proof that the Maddox phone was connected to a party line that included an area code provided a sufficient basis for the jury to infer, based on their common knowledge, that the line was part of the only system that utilizes area codes—*i.e.*, the interstate telephone system.[2] There is no need for further review of this factual issue, which was resolved against petitioner by the jury and the courts below.[3]

2. Petitioner next contends (Pet. 13-22) that the evidence demonstrated that he was entrapped as a

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[2] As the court of appeals explained (Pet. App. 10a): "From the testimony, the jury could have concluded, based on the common fund of information supposedly possessed by jurors, that the assignment of an area code to a number indicates that the telephone in question is capable of being utilized in interstate telephone calls and that the telephone was not merely part of a private intercom system." The court of appeals also noted (*id.* at 11a) that the evidence submitted by the government in this case, including evidence that the party line had an area code, distinguishes the present case from *United States* v. *Jones*, 580 F.2d 219, 222 (6th Cir. 1978).

[3] Petitioner also argues (Pet. 11) that there was no evidence that the Maddox phone was in working order. But the statute under which he was convicted requires no such proof. The statute simply requires that the telephone line be a facility of a common carrier engaged in interstate communications. At all events, the testimony of Lillian Wall established that the line to be tapped was in working order (Pet. App. 9a).

matter of law. He asserts (Pet. 13-18) that, because he was "induced" to commit an illegal act, he was entrapped as a matter of law regardless of his predisposition. He also argues (Pet. 18-22) that, in any event, there was insufficient evidence of predisposition. These arguments are without merit.

Petitioner's assertion that entrapment was established as a matter of law by proof that he was induced to commit a crime, or furnished with the opportunity for its commission, is squarely contrary to numerous holdings of this Court. The focus is not on the actions of government agents but on the defendant's readiness to commit the offense when given an opportunity. *Hampton* v. *United States*, 425 U.S. 484, 488-490 (1976); *United States* v. *Russell*, 411 U.S. 423, 436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 448-449 (1932). Evidence of inducement alone never has sufficed to establish entrapment.

Moreover, the record refutes petitioner's assertion that there was insufficient evidence to show that he was predisposed to commit the crime. Petitioner does not dispute (Pet. 19 n.6) that he stated that he knew the proposed transaction was illegal and that he alone would take the blame if the perpetrators were caught. This was, at a minimum, the sort of "ready acquiescence" that establishes predisposition. See *United States* v. *Artuso*, 618 F.2d 192, 195 (2d Cir. 1980); *United States* v. *Prieto-Olivas*, 419 F.2d 149, 151 (5th Cir. 1969); see also *Masciale* v. *United States*, 356 U.S. 386, 388 (1958). Viewed in its totality, the evidence of predisposition was overwhelming, as the court of appeals pointed out (Pet. App. 13a):

There was a great deal of evidence in the record from which the jury could find Lentz' predisposition: his statements that he knew the transaction was illegal, coupled with his willingness to continue his efforts to wiretap the phone; his volunteering to provide Hullum with eavesdropping devices; his exculpatory stories, told to the persons from whom he borrowed the equipment, regarding the use of the equipment; and his readiness to "take the rap" for the law enforcement officers should they be caught.

3. Petitioner also contends (Pet. 22-28) that "governmental conduct" in this case was so "outrageous" as to require dismissal of the prosecution on due process grounds. Petitioner argues that he was approached by three law enforcement officers acting in their official capacity—Hullum, Hall, and Fargo—who induced him to commit the offense and participated with him in the acts alleged in the indictment.

This argument is without merit for two reasons. First, contrary to petitioner's suggestion, this is not a case in which police officers approached a private citizen for assistance in the lawful discharge of their duties, appealed to his sense of civic duty, and only later revealed that the activities contemplated were unlawful. The evidence is clear that Hullum told petitioner, and petitioner well understood, that the contemplated wiretap was illegal and could result in "federal time" for everyone involved. Hullum and his deputies were acting in an "official capacity" only in a technical sense. What they proposed was unlawful and petitioner understood that from the outset. Despite this knowledge, petitioner readily executed the illegal scheme. It is not outrageous in any constitutional sense to prosecute persons who knowingly choose to violate the law in such circumstances.

See *United States* v. *Bocra*, 623 F.2d 281, 289-290 (3d Cir. 1980).

Second, it would be completely inappropriate to bar the federal government from prosecuting petitioner simply because his participation in the offense may have been invited by a local sheriff and his deputies in aid of their planned violation of federal law. As this Court has recognized, "in our federal system the State and Federal Governments have legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both." *Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977). See *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959). It is irrelevant whether it would be constitutionally offensive for Texas authorities to prosecute petitioner for acts solicited by state officers. The federal government has a compelling interest in maintaining the integrity of interstate communication systems—an interest that is not defeated or diminished by the misconduct of local officials acting without sanction of the federal government. The persons who solicited petitioner were not affiliated with the sovereign against whom petitioner committed his offense, and that sovereign therefore should not be estopped from protecting its interests.

4. Petitioner finally contends (Pet. 28-29) that it was plain error for the trial court to instruct the jury as follows (Pet. App. 22a n.13):

> The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission.

Petitioner argues that this instruction improperly shifted the burden of proof contrary to *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

Petitioner failed to object to the instruction at trial, and his objection is therefore properly deemed to be waived. See Fed. R. Crim. P. 30. In any event, the instruction was legally correct. Unlike the mandatory "presumption" language used in *Sandstrom* (see 442 U.S. at 515, 521-524), the charge here was "permissive" and merely allowed a reasonable "inference" to be drawn (Pet. App. 23a). Because the jury could choose whether or not to adopt the inference, and was instructed that the government bore the burden of proof on all issues, the instruction did not infringe petitioner's rights. See *United States* v. *Chiantese*, 560 F.2d 1244, 1255-1256 (5th Cir. 1979) (en banc).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 336355 261

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